No. 86-833

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT A. DESCHAMBAULT and
SIDNEY J. HARRISON,
Petitioners,

vs.

JAMES SOWELL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE IMMUNITY RECOGNIZED IN *BARR v. MATTEO*, 360 U.S. 564, 79 S. CT. 1335, 3 L. ED.2D 1434 (1959), PROTECTS PETITIONERS—FEDERAL EMPLOYEES SUED IN THEIR INDIVIDUAL CAPACITIES—FROM LIABILITY UNDER STATE TORT LAW FOR INJURIES ALLEGEDLY CAUSED BY THEIR OFFICIAL ACTS.

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The respondent, James Sowell, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision—a per-curiam affirmance without opinion—is reported at 791 F.2d 170 (1985) (Table), and is reprinted in the Petitioners' appendix at Pet. 1a. The orders of the district court are unreported, and are reprinted at Pet. 2a and 6a.

STATEMENT OF THE CASE AND FACTS

Despite the Petitioners' unsupported statement (Pet. 5) that their "safety duties plainly require them to make a variety of sensitive judgments in order to evaluate the effect of proposed actions upon the safety of the workplace," the evidence of record is overwhelming and uncontradicted, and thus is certainly sufficient to preclude summary judgment, that neither Deschambault nor Harrison had any discretion whatsoever to authorize a burn permit on the job which seriously injured James Sowell, whether or not these officials may have enjoyed some discretion in other aspects of their jobs.[1] Deschambault was fire protection inspector at the Naval Air Station in Pensacola, whose job it was, with Harrison's concurrence, to either issue or decline to issue a hazardous-operation permit for James Sowell's welding job, because the job in question required welding or cutting of a liquid container (*see* R2-60-B-4-5, 17-18).[2] Deschambault himself admitted that in performing this function, he was "[m]ost definitely" "required to meet national standards of excellence in regard to fire department and standard operating procedures" (R2-60-B-72).[3] Deschambault's

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1. *See Nixon v. Fitzgerald*, 457 U.S. 731, 755, 102 S. Ct. 2690, 73 L. Ed.2d 349, 367 (1982) ("Frequently, our decisions have held that an official's immunity should extend only to acts in performance of particular functions of his office"). *See generally Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 47 L. Ed.2d 128, 143-44 (1976) (constitutional claims).

2. "R" refers to the Record on Appeal in the circuit court. "R2-60-B-4-5, 17-18" refers to Volume 2 of that record, document 60-B of that volume, at pages 4-5 and 17-18 of that document.

3. Copies of the applicable Navy and OSHA regulations are attached to the depositions at R2-58-J, R2-58-C, and R2-58-A.

boss, Fire Chief Gilbert Vega, testified that "Mr. Deschambault knew there was sulfuric acid involved" (R2-58-A-13); and explicitly acknowledged that his inspectors, including Deschambault, were "require[d]" to follow all applicable regulations promulgated by the Navy (R2-58-A-6-7). Vega explained the regulations, and affirmed that under them, "as a fire inspector, you are required then to ask that certain tests be performed to assert what concentration and kind of gas is in that tank" (R2-58-A-6-7, 12). Deschambault was **required** by applicable regulations to conduct tests for gas before signing off on the burn permit.

Harrison was a safety specialist at the station, whose approval also was required for issuance of any burn permit (R2-60-A-15-16, 57-58; R2-60-B-18). Harrison's superior testified that Harrison had been verbally reprimanded because of this incident, since "he did not do what he was instructed to do, and as a result the accident occurred" (R2-58-G-7). Harrison "had been instructed that any time he's called to issue a burn permit on any type of container he will meter that container and get the results of the meter readings being zero before he will allow anyone to strike a torch" (*id.* at 10). If Harrison cannot meter the container, "[h]e will not issue the burn permit" (*id.*). Harrison was specifically aware of this requirement, prescribed in part by applicable OSHA regulations (*id.* at 10-11), and he had no discretion to depart from those regulations by relying upon the advice of somebody else (*id.* at 12). His failure to follow the rules was not excusable even if Harrison had been subjectively certain of the propriety of his decision, in light of such informal consultations (*id.* at 15-17). His transgression

was not "an honest mistake," "[b]ecause he had received specific instructions on handling the tanks" (*id.* at 14).[4]

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4. These sentiments were echoed by the Navy's Safety Director for Public Works (R2-58-C-2), who identified a Navy regulation requiring the cleaning and venting of any container holding a flammable substance, if the container is to be welded, cut or heated (*id.* at 14-16). "[W]ithout exception" (*id.* at 47), safety inspectors like Harrison were "required to follow the rules and regulations" (*id.; see id.* at 45-46, 52). Harrison had violated those regulations, because "[i]t's required—the requirements indicate you need to test the atmosphere . . . The requirement in the manual in essence requires that the tank should have been pressed up with water, vented—or drained and filled with water" (*id.* at 52). Harrison had actual knowledge of this requirement, because "just prior to the accident, a month or so—[he] had been to the gas free engineering course" in which "these requirements were discussed . . ." (*id.* at 48).

These conclusions were also supported by one of the other safety specialists in Harrison's department (R2-58-J-3-5, 7), who verified that under the OSHA and other regulations, all drums "shall" be filled with water or thoroughly cleaned of toxic or flammable substances before welding (*id.* at 11-12). Under these instructions, and Harrison's verbal instructions, "you can't do it without putting a meter on it, and you can't meter it unless it's cleaned and purged" (*id.* at 32; *see id.* at 16, 34). Indeed, the burn permit itself has a check-off recording that the container in question has been purged of all combustibles, which should have been checked off before the permit was issued (*id.* at 40). Harrison was well aware of these requirements, because he had "been trained in the provisions of the documents which were given out . . . and if that had been followed, it [the accident] wouldn't have happened" (*id.* at 29-30). And it was no excuse that Harrison purportedly relied upon the opinion of a "chemist," because that "doesn't meet the standards we utilized for hot work permits in the cleaning and purging and testing" (*id.* at 33).

ARGUMENT[5]

1. No Decision of This Court or Any Court of Appeals Has Expanded the Official-Immunity Doctrine of Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed.2d 1434 (1959), to the Performance or Non-Performance of Non-Discretionary Acts, and No Policy Underlying That Doctrine Supports Such Expansion, and Thus Review of the Court of Appeals' Decision in This Case Is Unwarranted.

The Solicitor General's primary position is that "federal employees are protected from personal financial liability under state tort law as long as they act within the scope of their official duties" (*Westfall* Pet. at 12). By this the government appears to suggest that an official should be entitled to absolute immunity so long as his conduct was reasonably within the parameters of his job description, even if he was subject to mandatory directives, and thus had no discretion, in his performance of the specific task in question. The Solicitor General seeks to invoke this Court's consideration of that position on two bases—that the federal circuits are split concerning its propriety (*Westfall* Pet. at 6-9), in light of decisions of this Court which may support it (*Westfall* Pet. at 9-13); and that the broad scope of the official-immunity doctrine advocated will best serve its objectives (*Westfall* Pet. at 9-12). Both contentions are wrong.

A. This Court's Decisions. To begin with, no decision of this Court has endorsed so broad a definition of

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5. The Petition in this case adopts and incorporates the arguments raised in the Petition in *Westfall v. Erwin*, No. 86-714 (hereinafter "*Westfall* Pet."). This Brief in Opposition therefore will respond to the arguments raised in *Westfall*.

the privilege. To the contrary, in the first "comprehensive discussion of the doctrine" (*Westfall* Pet. at 9), the Court acknowledged "a distinction between actions taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." *Spalding v. Vilas*, 161 U.S. 483, 498, 16 S. Ct. 631, 40 L. Ed. 780, 785-86 (1896). That is simply another way of saying that there is no immunity if the asserted act or omission in question involves a non-discretionary function, since an official never has discretion to exceed his authority.[6] It is not surprising, therefore, that the Court in *Spalding* spoke of the need to protect "judges and courts of superior jurisdiction," along with the "heads of executive departments. . . ." 161 U.S. at 498, 16 S. Ct. 631, 40 L. Ed. at 785.

A similar perspective is found in *Barr v. Matteo*, 360 U.S. 564, 574, 575, 79 S. Ct. 1335, 3 L. Ed.2d 1434, 1443 (1959), in which "[t]he question is a close one," but the Court held that "[i]t would be an unduly restrictive view of the scope of the duties of a policymaking official [the head of an agency] to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty." Although

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6. Even before *Spalding*, this Court had said that "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion." *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98, 11 L. Ed. 506 (1845). The passage from *Spalding* quoted by the Solicitor General (*Westfall* Pet. at 10) is entirely consistent with this pronouncement, because it notes only that "the head of an Executive Department" should not be inhibited in the performance of his job. 161 U.S. at 498, 16 S. Ct. 631, 40 L. Ed. at 786. As we will note at greater length in a moment, the threat of personal liability cannot possibly inhibit the performance of an obligation which is mandatory notwithstanding such a threat.

rank alone was not dispositive, 360 U.S. at 572-73, 79 S. Ct. 1335, 3 L. Ed.2d at 1442, the defendant's high-level position of course was relevant to the nature of his duties, and it was only in light of "the action here taken" by the defendant, a clearly-discretionary action, that conduct "within the outer perimeter of [his] line of duty" was "enough to render the privilege applicable . . . ." 360 U.S. at 575, 79 S. Ct. 1335, 3 L. Ed.2d at 1443. *Compare Westfall* Pet. at 11. The "action here taken" was plainly discretionary in nature. Indeed, the Court noted that "the occasions on which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions," "because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails." 360 U.S. at 573, 79 S. Ct. 1335, 3 L. Ed.2d at 1442. That is an explicit acknowledgment that the privilege depends in part upon the "scope of discretion" involved.

Admittedly (*see Westfall* Pet. at 13), the *Barr* decision did afford immunity despite the fact that the defendant "was not *required* by law or by direction of his superiors to speak out," "for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts . . . ." 360 U.S. at 575, 79 S. Ct. 1335, 3 L. Ed.2d at 1443. But subsequent decisions have resolved that ambiguity. For example, in *Doe v. McMillan,* 412 U.S. 306, 322, 93 S. Ct. 2018, 36 L. Ed.2d 912, 926 (1973), wholly apart from the Court's citation of one case dealing with constitutional claims, *see Westfall* Pet. at 11 n.7, the Court acknowledged the defendant's contention that his conduct was " 'within the outer perimeter' of [his] statutory duties," and further acknowledged that "if official

immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials," and yet flatly desclared that "[t]his, however, is not the governing rule." To the contrary, in preference to the kind of "fixed, invariable rule of immunity" proposed by the Solicitor General here, the *McMillan* Court favored "a discerning inquiry into whether the contributions of immunity to effective government . . . outweigh the perhaps recurring harm to individual citizens." 412 U.S. at 320, 93 S. Ct. at 2028, 36 L. Ed.2d at 925. In that context, immunity would attach only to those officials of "suitable rank," perhaps for example to judges, but "policemen and like officials apparently enjoy a more limited privilege . . . ." 412 U.S. at 319, 93 S. Ct. 2018, 36 L. Ed.2d at 925, 924.

In light of these pronouncements, the Solicitor General is clearly wrong to suggest (*Westfall* Pet. at 11 n.7) that the *McMillan* opinion is ambiguous, and in any event, any such ambiguity was certainly resolved by the Court's explicit pronouncement in *Butz v. Economou*, 438 U.S. 478, 495, 98 S. Ct. 2894, 57 L. Ed.2d 895, 909 (1978), that "[n]either [*Barr v. Matteo* nor *Spalding*] purport to abolish the liability of federal officers for actions manifestly beyond their line of duty . . . [T]hey are accountable when they stray beyond the plain limits of their statutory authority . . . ." Thus, it is not surprising that in *Nixon v. Fitzgerald*, 457 U.S. 731, 756, 102 S. Ct. 2690, 73 L. Ed.2d 349, 367 (1982), the Court found it "appropriate to recognize absolute immunity from damages liability for acts within the 'outer perimeter' of [the President's] official responsibility," but only "[i]n view of the special nature of the President's constitutional offices and functions . . . ." The "nature" of those functions required immunity, but only for acts within the " 'outer perimeter' " of "official responsibility."

As we have noted, the violation of a non-discretionary obligation is not within the "outer perimeter" of an official's duty. The doctrine of official immunity, as consistently defined by this Court, does not extend to non-discretionary functions.

B. The Court of Appeals' Decisions. Of the hundreds of Court of Appeals' decisions on this question, the Solicitor General has discovered two which assertedly depart from the plain meaning of this Court's opinions (*see Westfall* Pet. at 6). The Solicitor General acknowledges that all but two of the federal circuits have embraced some concept of "discretion" as a predicate for application of the privilege, although these courts assertedly differ in the extent to which such discretion must involve judgment, planning or policymaking. But the Solicitor General finds a contrary conclusion in *Poolman v. Nelson,* 802 F.2d 304 (8th Cir. 1986), because that court "has found federal officials acting within the outer perimeter of their line of duty immune from common law tort liability without expressly distinguishing discretionary and ministerial activity." 802 F.2d at 307.

In the same breath, however, the *Poolman* court noted that "[l]ikewise, this court has found federal officials subject to personal liability for tortious activity because their activity was not within the outer perimeter of their line of duty without expressly drawing the line between discretionary and ministerial activity." In short, as the *Poolman* court expressly noted, the official's discretion is obviously relevant to the question of whether he acted within the scope of his authority, and thus was entitled to a privilege: "This is not to say that the discretionary or ministerial nature of an activity is never relevant in determining whether an official's acts are within the outer

perimeter of his scope of authority. Undoubtedly, this outer perimeter fluctuates in relation to the degree of discretionary authority afforded an official." *Id.* at 307-08. In preference to a dispositive reliance upon the ministerial/discretionary distinction, the *Poolman* court focused on "the central question of whether the complained of acts were sufficiently within the officer's scope of authority such that he should enjoy immunity in order to assure 'the fearless, vigorous, and effective administration of policies of government.'" *Id.* at 308, *quoting Barr v. Matteo.*

The *Poolman* court felt that "*Barr* indicates that by allowing the degree of discretion embodied in a particular function to remain a factor—as opposed to requiring bright-line distinctions between discretionary and ministerial acts—courts can better resolve this conflict." *Id.* at 308. It affirmed the district court's summary judgment for the defendant because "[w]e cannot conclude that [the defendant] exceeded the bounds of his control and supervision by, at his discretion, engaging in communications . . . concerning the status of [the plaintiff's] loan application." *Id.* at 309. In light of this language, there can be little question that the *Poolman* court would reject the inviolable scope-of-authority rule advocated by the Solicitor General, in favor of a more flexible policy-oriented review of the particular functions at issue, informed in part by the degree of discretion permitted.

The Solicitor General also finds conflict in *Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985), which states that this Court "has not yet put its imprimatur upon a 'ministerial duty' exception to absolute immunity." But the court in *Ricci* found it unnecessary "to tackle this question here. If the conduct before

us is discretionary, the availability of absolute immunity is well established." *Id.* Relying upon declarations of this Court that "a law which fails to specify the precise action to be taken creates only discretionary authority," the *Ricci* court concluded that the conduct at issue "was clearly a discretionary act," *id.*, and was entitled to absolute immunity "even if absolute immunity from common-law liability is limited to government conduct which is discretionary in nature . . . ." *Id.* at 465. Thus, the *Ricci* court left for another day its evaluation of the discretionary/ministerial distinction, and this Court's review of any such conclusion should await another day as well.

In light of the foregoing, we submit that no decision of this Court or any Court of Appeals would impose absolute immunity for the performance of an act which a public official had no discretion to perform, because it was outside the scope of his authority, or for the non-performance of an act which a public officical had no discretion to decline. There is therefore no conflict among the circuits to resolve, and the reason for that, we submit, is that the objectives underlying the doctrine of official immunity would not be served by such an expansive construction of that doctrine.

C. The Policies in Question. The Solicitor General rightly observes (*Westfall* Pet. at 14-17) that the primary purpose of the rule is to remove an inhibition upon the effective functioning of governmental officials, in light of any uncertainty that their actions might result in some personal liability, or even in a lawsuit in which they must expend time and money to establish their immunity. But that worthy objective is not implicated when the governmental function in question is mandatory rather than discretionary, and thus the official has no choice in the matter in any event. Wholly apart from any threat of

personal liability, Deschambault and Harrison were **required** to vent and clean the container in question of any flammable substance, and then meter it, before permitting it to be welded or cut. That was a mandatory requirement. Any threat of personal liability could not possibly have affected their obligation to perform this function, because they were independently required to do so. Affording them absolute immunity, therefore, could not possibly serve the central purpose of that doctrine. To paraphrase the Solicitor General (*Westfall* Pet. at 17-18), it would permit "actual injustice" to "go unredressed," without serving "the greater good."

Perhaps sensing this central fallacy of its argument, the Solicitor General advances the fallback position (*Westfall* Pet. at 15) that "[e]ven if an employee's duties are solely ministerial . . . the federal government may bear the loss of productivity due to the time that the employee was required to devote to defending the lawsuit." Of course, if that were a sufficient basis for immunity, then this Court would never have permitted any action against any public official. Mindful that every privilege reflects an accommodation of competing interests, it is clear that although "some draining of government resources occurs whenever government officials are called to defend their actions in court," "the burden to effective government does not outweigh the dangers to individual citizens of being severely or permanently injured or maimed by negligent [governmental conduct]." *Jackson v. Kelly*, 557 F.2d 735, 739 (10th Cir. 1977). Surely the government's fallback position is unworthy of consideration by this Court.

By the same token, the Court of Appeals' per-curiam affirmance without opinion in the instant case is unworthy of this Court's review. Regardless of the specific reason-

ing of the district court's unpublished order denying summary judgment, both that order and the Court of Appeals' affirmance of that order are independently defensible[7] on the basis of the overwhelming and uncontradicted evidence that neither Deschambault nor Harrison had any discretion to issue the burn permit under the circumstances in which they did, and thus were not entitled to absolute official immunity under the unanimous decisions of this Court and the various Courts of Appeals. In light of the independent sufficiency of this basis for the Court of Appeals' affirmance without opinion, its order is unworthy of this Court's review.

2. Assuming Arguendo That the Governmental Functions in This Case Were Discretionary in Nature, They Nevertheless Were Not Entitled to Absolute Immunity, Under Well-Settled Principles Which Do Not Require This Court's Review.

The Petitioners' back-up position (Pet. 5) is that they "would be immune from tort liability even if this Court were to determine that immunity is limited to federal employees who exercise discretion," because their "safety duties plainly require them to make a variety of sensitive judgments in order to evaluate the effect of proposed actions upon the safety of the workplace." This point is not developed further in the instant petition, and the complementary argument in the *Westfall* petition is

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7. *See generally Romero v. International Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed.2d 368 (1959); *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943); *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 85 L. Ed. 224 (1937); *Tymshare, Inc. v. Covell*, 234 U.S. App. D.C. 46, 727 F.2d 1145, 1150 (1984); *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980).

explicitly made to be dependent upon the supervisory responsibilities of the petitioners in that case: "In the course of overseeing the operation of the warehouse, petitioners must issue literally hundreds of instructions on a daily basis to the employees of that facility. Petitioners' performance as supervisors plainly would be chilled, and the overall operation of the facility thereby adversely affected, if they were threatened with personal liability in connection with each and every one of these instructions" (*Westfall* Pet. at 19 n.18).

No analogous argument is available in the instant case, and the Petitioners here have made no such argument. Their jobs were not supervisory, or **prescriptive**, in nature, involving not simply the implementation of pre-existing policies, but rather the creation and enforcement of guidelines applicable beyond the spacial and temporal limits of a specific event. Regardless of any degree of discretion which they might have enjoyed, Deschambault and Harrison were charged not to make policies, but to implement policies which already had been made by others. And although we must agree with the Solicitor General (*Westfall* Pet. at 6-9) that the Courts of Appeals have taken different approaches to the question of what kind of discretionary functions are entitled to absolute immunity, and that some have protected "operational-level" decision-making, we have discovered no cases, in the appellate courts or in this Court, and the Solicitor General has cited none, in which immunity extended to the mere implementation of pre-existing policies, even if that function required the exercise of some discretion.

To the contrary, for example, although a federal public defender obviously exercises enormous discretion in fashioning a defense, he is not entitled to absolute immunity from prosecution for malpractice. *See Ferri v.*

Ackerman, 444 U.S. 193, 100 S. Ct. 402, 62 L. Ed.2d 355 (1979). Similarly, FBI agents and police officers are not entitled to absolute immunity for false arrest—for an operational-level decision, governed by pre-existing criteria, which obviously involves enormous discretion. *See Pierson v. Ray,* 386 U.S. 547, 555, 87 S. Ct. 1213, 18 L. Ed.2d 288, 295 (1967); *Henry v. United States,* 361 U.S. 98, 101-02, 80 S. Ct. 168, 4 L. Ed.2d 134, 138-39 (1959).

Discretion alone is insufficient to warrant immunity. To the contrary, immunity depends upon "a discerning inquiry into whether the contributions of immunity to effective government . . . outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan,* 412 U.S. at 320, 93 S. Ct. 2018, 36 L. Ed.2d 925. The negligent implementation or failure to implement a pre-existing policy, even if it reflects the exercise of some discretion, cannot possibly interfere with "effective government"—that is, with the creation of rules or guidelines governing day-to-day conduct. It is inconceivable that subjecting to the risk of personal liability a lower-level official whose job it is to implement policies rather than to make them—to resolve discrete problems under guidelines formulated by others —could undermine the objectives of government by inhibiting the act of governing.

At such a level of government, "the acts of federal employees have no noticeable implications for government policy," and "those employees are no more entitled to be free from responsibility for their acts than are employees in the private sector." *Franks v. Bolden,* 774 F.2d 1552, 1555 (11th Cir. 1985). At that level, "holding government . . . personnel to the same standards of care which they would face outside of government service in no way burdens their public responsibility or deters entry into

government service or the vigorous exercise of public responsibility once having entered that service."[8] In this light, it is not surprising that the Solicitor General has cited no case affording immunity to the mere exercise of discretion in the context of implementing policies formulated by others, but instead contends in *Westfall* that immunity was appropriate because the "supervisors" there "must issue literally hundreds of instructions on a daily basis," and should not be "threatened with personal liability in connection with each and every one of these instructions" (*Westfall* Pet. at 19 n.18).

Under no view of the evidence would Deschambault and Harrison fall into a similar category of public responsibility, and thus the instant case is entirely outside of the debate in *Westfall*. Of course, we continue to insist that the Court of Appeals' decision in the instant case is independently defensible on the basis of the uncontradicted evidence that Deschambault and Harrison had no discretion whatsoever in the performance of the particular function at issue. But even assuming *arguendo* that they had such discretion, it was certainly not enjoyed in the context of making decisions of a prescriptive nature. Neither this Court nor any Court of Appeals has recognized a privilege in the performance of functions analogous to those of Deschambault and Harrison, even if discretionary in some way, and thus the Court of Appeals' decision in this case is unworthy of this Court's consideration.

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8. *Henderson v. Bluemink*, 167 U.S. App. D.C. 161, 511 F.2d 399, 402-03 (1974). *See Spencer v. General Hospital of the District of Columbia*, 138 U.S. App. D.C. 48, 425 F.2d 479, 489 (1969) (en banc) (Wright, J., concurring) ("This is not to say that the performance of an operation does not involve judgment and discretion. The point is that *medical*, not *governmental*, judgment and discretion are involved").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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